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## PUTTING GUANTANAMO IN THE REAR- VIEW MIRROR: THE POLITICAL ECONOMY OF DETENTION POLICY

PETER MARGULIES\*

### INTRODUCTION

Guantanamo is a little bit like Humpty Dumpty in reverse. It was alarmingly easy for the Bush administration to put together and has proven very difficult to take apart. At its core, however, closing Guantanamo resembles other examples of facility siting, in which the government determines where to put uses that trigger fear or mistrust.<sup>1</sup> Siting disputes turn on three factors: efficiency, equity, and accuracy. President Obama's initial announcement that he planned to close Guantanamo within one year<sup>2</sup> triggered congressional opposition. Congress took the announcement as a signal that the President had not adequately considered the interaction of these three elements.<sup>3</sup> However, the President's recent efforts focus more closely on these factors.<sup>4</sup> Because of this improved signaling, the President's program will be productive, even though meeting the one-year deadline has proven to be impossible.

This piece first defines efficiency, equity, and accuracy. Efficiency refers to the ease with which the government achieves a goal. President Obama's efforts to close Guantanamo reframed efficiency to entail not just catching suspected terrorists but also regaining the goodwill that the United States had lost during the

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\* Professor of Law, Roger Williams University. I thank Brad Berenson, John Parry, and Sudha Setty for comments on a previous draft.

1. See Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not in My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945, 951-57 (1992).

2. See Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, N.Y. TIMES, Jan. 23, 2009, at A1.

3. See Anne E. Kornblut & Dafna Linzer, *White House Regroups on Guantanamo*, WASH. POST, Sept. 25, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/24/AR2009092404893.html>.

4. *Id.* The attempted Christmas Day bombing has heightened concern about the accuracy of decisions to release detainees. See Charlie Savage, *Nigerian Man Is Indicted in Attempted Plane Attack*, N.Y. TIMES, Jan. 7, 2010, at A14; David G. Savage, *Yemenis Might Stall Closure of Guantanamo*, L.A. TIMES, Dec. 30, 2009, at A10.

preceding eight years.<sup>5</sup> Equity speaks to burden-sharing. Both domestic political actors, such as legislators, and representatives of other sovereign nations wish to ensure that no one site ends up with a disproportionate number of detainees. However, the domestic and international audiences clash in how they prioritize equity. Domestic audiences fear an overconcentration of detainees in any one state as well as the outright release of detainees into any community. Foreign governments wish to avoid a disproportionate share of detainees compared with other nations. Accuracy requires reliable determinations of a detainee's past affiliations and future dangerousness.

The challenge arises because these factors often conflict. Unless policymakers are careful, efficiency will trump both accuracy and equity. This result yields erroneous risk assessments and skews distribution of burdens. The Bush administration used Guantanamo as a site for suspected terrorists precisely because it valued the site's ease of use and discounted the two other factors. The Supreme Court rebuked the Bush administration in a series of landmark cases.<sup>6</sup> President Obama rightly sought to remedy the problem that the Bush administration had created. Ironically, however, his initial efforts also failed to manage the conflict between efficiency, equity, and accuracy.

Obama's early announcement of a one-year deadline neglected the importance of signaling. In dealing with external audiences, such as Congress, signaling is vital to assure trust. Ambiguous signals generate mistrust, despite the sender's good intentions. Ironi-

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5. See Exec. Order No. 13,492, § 2(b), 74 Fed. Reg. 4897, 4897 (Jan. 22, 2009) [hereinafter Executive Order 13,492], available at [http://www.whitehouse.gov/the\\_press\\_office/closureofguantanamo detention facilities/](http://www.whitehouse.gov/the_press_office/closureofguantanamo detention facilities/).

6. See generally *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (striking down provisions of Military Commissions Act enacted at President Bush's prompting that precluded access to habeas corpus for Guantanamo detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that Congress had not authorized President Bush's unilateral establishment of military commissions to try suspected terrorists); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that Congress had authorized detention of individuals apprehended on the battlefield, but that government must provide due process). For commentary on this line of cases, see David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007-08 CATO SUP. CT. REV. 47 (2008) (praising *Boumediene*). Cf. Neal Kumar Katval, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 92-103 (2006) (describing President Bush's order establishing military commissions as unprecedented assertion of presidential power that undermined settled norms); Eric A. Posner, *International Law and the War on Terror: Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007-08 CATO SUP. CT. REV. 23, 39-46 (2008) (criticizing *Boumediene* as unduly extending protections of American law to noncitizens not on American soil).

cally, Congress took Obama's early closure deadline as a signal that he shared Bush's prioritizing of efficiency over accuracy.<sup>7</sup> For Congress, this meant that Obama cared more about closing Guantanamo on deadline and less about the probability of false negatives—the release of truly dangerous individuals.<sup>8</sup> Congress also worried that Obama cared more about equity among nations asked to resettle detainees and less about equity among states where the administration would seek to transfer detainees who could not be resettled internationally.

After several months of cross-talk with Congress, the administration adjusted its signaling.<sup>9</sup> Beginning with Obama's May 2009 speech at the National Archives,<sup>10</sup> the administration indicated that its first priority was achieving the right balance between efficiency, accuracy, and equity. In another irony, Obama achieved that balance by indicating that he was willing to accept, albeit with heightened procedural safeguards, a number of the measures initiated by the Bush administration, including military commissions and detention under the law of war. Congress responded by signaling greater willingness to work with the President to fashion a comprehensive process for closing Guantanamo.<sup>11</sup>

To analyze the prospects for closing Guantanamo, this Article includes five parts. Part I sets out the values of efficiency, equity, and accuracy that should guide decisions about siting and disposition. Part II discusses the importance of signaling and the problems caused by initial ambiguous signals in a path-dependent policy process. Part III describes how early inattention to signals sent to Congress caused problems for the new administration's Guantanamo closure policy. Part IV discusses the recalibration in signaling represented by President Obama's May 2009 speech and the administration's follow-up on the three values described in Part I. It concludes that the administration has arrived at an approach in consultation with Congress that largely vindicates these values. However, many improvements are still needed, such as access to habeas corpus for detainees at non-Guantanamo sites like Bagram Air Base in Afghanistan, limits on material support charges triable

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7. See Kornblut & Linzer, *supra* note 3.

8. See *id.*

9. See *id.*

10. See President Barack Obama, Remarks by the President on National Security (May 21, 2009) [hereinafter Obama Remarks], available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

11. See Kornblut & Linzer, *supra* note 3.

before military commissions, and the use of hearsay evidence. Part V discusses logistical and policy options for overcoming political resistance to the closure of Guantanamo and the transfer of detainees to custodial facilities in the United States.

### I. THREE CORE VALUES: EFFICIENCY, EQUITY, AND ACCURACY

The political and ideological debates surrounding Guantanamo can sometimes obscure the central values at stake. These core values are efficiency, equity, and accuracy. I discuss each in turn.

#### A. *Efficiency*

Efficiency entails the simplest way to achieve a given goal. As a general matter, approaches that take more time or create more decision costs are not efficient. However, efficiency offers less reliable guidance when goals conflict, or when one defines goals at different levels of generality or over different time horizons.

As one neutral example, consider the question of transportation. Given the question, “What is the most efficient way to get from an individual’s suburban home to her suburban office today?,” the answer might well be, “Drive my car.” However, if the question were framed differently, as, “What is the most efficient way to reduce consumption of carbon-based fuels?,” then the respondent would consider whether it was practicable to bike to work or take a bus. Reliance on notions of efficiency often privileges short-term inquiries.<sup>12</sup> However, that results from humans’ distorted discounting function,<sup>13</sup> not any inherent attribute of efficiency.

Some developing countries may also ask, “What is the most efficient way that we can grow our economies?” This question might yield the answer, “Rely on currently cheap fossil fuels such as coal as much as possible.” But, if one asked the question differently, as, “How do we most efficiently ensure that our economic growth is sustainable?,” then we might arrive at a different answer that emphasized renewable energy sources.<sup>14</sup>

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12. See Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 69 (1972).

13. See Richard J. Lazarus, *Environmental Law After Katrina: Reforming Environmental Law by Reforming Environmental Lawmaking*, 81 TUL. L. REV. 1019, 1043 (2007) (discussing the “tendency of human nature to discount disproportionately the consequences of human conduct that are distant rather than immediate”).

14. See *Massachusetts v. EPA*, 549 U.S. 497, 523-24 (2007) (rejecting the agency’s argument that greenhouse gas emissions from China and India will render moot any United States efforts to reduce emissions); cf. Richard B. Stewart, *States and Cities as*

As another example of the disposition of persons, consider the issue of community placements for people with mental disabilities. Decades ago, state governments faced with opposition from civil liberties advocates and budgetary concerns decided to move people out of huge institutions.<sup>15</sup> The most efficient means for moving people out of psychiatric hospitals was placing former inpatients in large “adult homes.” These facilities were technically located in communities. As a practical matter, however, adult homes often replicated the worst aspects of institutional living.<sup>16</sup> In contrast, policy makers who defined efficiency as the development of community placements that offer people with mental disabilities the chance to live independently would stress more human-scale residential alternatives.

The operation of the Guantanamo detention facility under President Bush also revealed internal tensions within the concept of efficiency. A narrow vision of efficiency drove the Bush administration’s establishment of the facility. Bush officials focused on Guantanamo’s appeal as a site outside the United States and believed that geography would defeat accountability.<sup>17</sup> The government would then be free to detain, interrogate, and punish suspected terrorists with minimal interference. The Supreme Court ultimately rejected this vision.<sup>18</sup> Moreover, the Bush administra-

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*Actors in Global Climate Regulation: Unitary v. Plural Architectures*, 50 ARIZ. L. REV. 681 (2008) (discussing the role of subnational actors).

15. See Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 514-15 (1999).

16. See *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209(NGG), 2009 U.S. Dist. LEXIS 80975, at \*5, 50 (E.D.N.Y. Sept. 8, 2009) (holding that New York’s policy of referring former psychiatric inpatients to adult homes and reimbursing their care violated Americans with Disabilities Act).

17. See Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., to William J. Haynes II, Gen. Counsel Dep’t of Def. (Mar. 14, 2003), available at [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf). For criticism of the legal advice supporting the selection of Guantanamo as a site for detention and interrogation of suspected terrorists, see Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455, 455 (2005); Stephen Gillers, *Legal Ethics: A Debate*, in *THE TORTURE DEBATE IN AMERICA* 236, 237-38 (Karen J. Greenberg ed., 2006); David Luban, *The Torture Lawyers of Washington*, in *LEGAL ETHICS AND HUMAN DIGNITY* 162, 176-80, 200-02 (2007); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 35-40 (2008); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579 (2009); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80-85 (2005).

18. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534-36 (2004); *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

tion also pursued a competing vision of efficiency that focused on ad hoc deals to placate allies.<sup>19</sup> In one such case, the Bush administration agreed to the release of a Kuwaiti detainee named Abdallah Salih al-Ajmi who had earlier fought with the Taliban. Al-Ajmi subsequently blew himself up in northern Iraq in a suicide bombing that killed members of Iraq's security forces.<sup>20</sup> For a global power like the United States, siting a detention facility for suspected terrorists inevitably exhibits efficiency's disparate meanings.

### B. *Equity and Facility Siting*

Efficiency also clashes with another fundamental value: equity. Equity refers to communities, states, and countries receiving an equal or equivalent share of both benefits and burdens.<sup>21</sup> Allocating burdens disproportionately to one entity is inequitable.

Equity issues often arise because the promotion of public goods that aid all of society may also engender more localized harm. If every community stresses localized harm over public goods, the result is the familiar "Not in My Backyard" syndrome.<sup>22</sup> However, the government's failure to equitably allocate localized harms raises concerns about equity. Land use and refugee resettlement policy constitute two examples.

In land use, siting certain kinds of facilities can promote important public policies but also impose disproportionate impacts on particular communities. For example, suppose one believes that wind farms can supply an efficient solution to the problem of sustaining an economy in an era of increasingly scarce resources while managing climate change. To achieve this public good, policymakers would consider efficiency issues at a more concrete level, asking where government should site wind farms to maximize the benefit from this sustainable technology. Here is where equity enters the

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19. See MARK DENBEAUX ET AL., SETON HALL LAW CENTER FOR POLICY & RESEARCH, PROFILE OF RELEASED GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY THEN AND NOW 19-25 (2008), available at [http://law.shu.edu/center\\_policy\\_research/reports/detainees\\_then\\_and\\_now\\_final.pdf](http://law.shu.edu/center_policy_research/reports/detainees_then_and_now_final.pdf); cf. Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 407 n.220 (2009) (arguing that the Bush administration's reasons for declining to release detainees also included concerns about security situation in Yemen and compliance with Convention Against Torture).

20. See Josh White, *Ex-Guantanamo Detainee Joined Iraq Suicide Attack*, WASH. POST, May 8, 2008, at A18.

21. Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1028-30 (1993).

22. *Id.* at 1001.

equation. Efficiency, in this narrow sense, may be served by siting as many wind farms as possible in communities that lack the political or economic clout to resist siting. However, while wind farms are presumably a relatively benign technology—indeed, that is part and parcel of their appeal—they do have localized impacts in terms of noise and appearance. Considerations of equity would demand sharing these burdens across communities, although this approach would be less efficient if policymakers wished to build the maximum number of turbines in the shortest possible time.

Allowing space for airing concerns about equity has become important in addressing community opposition to siting decisions. Consider, for example, the environmental-justice movement. Low-income communities of color have rightly complained that certain undesirable uses, including waste plants, have been disproportionately located near them.<sup>23</sup> These communities receive the brunt of harms associated with such projects, including pollution, noise, and noxious aromas. Accommodating these legitimate concerns clashes with the “efficient” construction of facilities.

Facilities serving people also promote public goods but often impose localized harms. For example, residential treatment facilities for people with substance abuse problems clearly serve the public interest by enhancing alternatives to drug addiction and incarceration. However, situating such facilities disproportionately in low-income communities imposes risks on these communities, including the risks from facility residents who relapse in their rehabilitation and break the law.<sup>24</sup>

In the human services context, such fears may often be exaggerated. Many facilities are well run, minimizing adverse impacts on their communities. Often attitudes hostile to such facilities stem from animus, not from attention to the facts.<sup>25</sup> Indeed, in address-

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23. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grass-roots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 775 (1998); cf. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2001-02 (2007) (discussing equity in siting of redevelopment projects that displace low-income community residents).

24. Cf. Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 677-78 (2005) (discussing case law). *But see id.* at 726 (discussing sincere community concerns, particularly concerns about facilities that fail to provide adequate services or permit drug use by facility residents).

25. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (holding that enacting restrictive zoning regulations for a group home for people with



ing complaints of discrimination from long-time providers of drug addiction rehabilitation or similar services, courts have found that localities raising concerns about overconcentration have violated federal fair housing legislation.<sup>26</sup>

However, even in such cases, equity is important. First, government's commitment to equity sends the message that such facilities in fact serve the public good. When government endures the tougher contest of siting facilities in communities better able to mobilize opposition, it demonstrates its sincere view that such facilities serve pressing social needs.<sup>27</sup> Second, equity helps defuse opposition. As democracy shows again and again, when communities have a voice, they are more likely to accept results as fair.<sup>28</sup> When states have used equitable formulas to allocate uses such as group homes, they have often built a consensus that would be lacking in the absence of such procedures. Having a voice also provides communities with a sense of control and counters fears that the government will act out of expedience, not principle.

Equity also emerges on the question of refugee resettlement.<sup>29</sup> Scholars advocating for regional refugee resettlement have emphasized that regional solutions share the burden of resettlement.<sup>30</sup> They allocate refugee flow to a range of countries instead of con-

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mental retardation based on unsubstantiated fears while allowing uses such as dormitories was a violation of the Equal Protection Clause).

26. See Reg'l Econ. Cmty. Action Program v. City of Middletown, 294 F.3d 35, 50-51 (2d Cir. 2002).

27. See generally Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 32 (2008) (arguing that requiring more extensive procedures from legislatures as a "price" for enacting law assures courts that a legislature is committed to policy and understands consequences).

28. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* 27-30 (1990) (asserting that belief in procedural fairness, including decision makers' rejection of self-dealing, inspires compliance with legal norms); cf. Bernard P. Perlmutter, "Unchain the Children": Gault, *Therapeutic Jurisprudence*, and *Shackling*, 9 BARRY L. REV. 1, 54-59 (2007) (discussing how giving children more control in juvenile justice cases by rejecting practice of shackling children in the courtroom promotes rehabilitation).

29. Questions of equity in refugee resettlement are not new. President Franklin Roosevelt considered the issue in attempting to formulate a plan for the resettlement of Jewish refugees from Germany. See Patricia Cohen, *Roosevelt and the Jews: A Debate Rekindled*, N.Y. TIMES, May 1, 2009, at C25 (discussing new book that outlines Roosevelt's consideration of a plan that would have resettled refugees in a number of countries).

30. Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 1, 12-13 (2004); see Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT'L L. 355 (2009) (discussing numerous resettlement mechanisms and the benefits that each provide).

centrating refugees in one country where burdens become unmanageable. Within host countries, equity is also important. In the United States, for example, some efforts were made to resettle refugees in different states, to avoid undue concentrations of refugees.<sup>31</sup> Where concentrations developed, the federal government offered aid to defray state costs entailed in providing education and other services.<sup>32</sup> Federal outreach was not always as effective as it should have been. Moreover, a few “gateway” states generally absorb most of the immigrant population along with resulting costs.<sup>33</sup> These states pay in more to the federal government than they receive back in immigrant-related aid.<sup>34</sup> However, this issue points to a problem with ensuring equity, not a flaw in looking to equity as a guiding principle.

### C. Accuracy

In any question regarding siting facilities or the placement of people, accuracy is a fundamental value. Policies carried out with breathtaking efficiency amount to very little if they are based on inaccurate information. Accuracy in any decision must minimize two kinds of errors: false positives and false negatives.

False positives are errors where we think a person, practice, or condition is harmful, but it actually is not.<sup>35</sup> False negatives are errors that occur when we believe a person, practice, or condition is harmless, but it actually poses dangers.<sup>36</sup> As an example, consider whether proximity to power lines causes a heightened risk of cancer. If we believed power lines had this consequence, but they do not, we would be committing a “Type I” error, which results in a false positive. However, if we believed that proximity to power lines had no ill effects, but it actually correlates with a heightened

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31. See 8 U.S.C. § 1522(a)(2)(C) (2006).

32. *Id.* § 1522(b)(2).

33. See generally Shirley Tang, *Challenges of Policy and Practice in Under-Resourced Asian American Communities: Analyzing Public Education, Health, and Development Issues with Cambodian American Women*, 15 ASIAN AM. L.J. 153 (2008) (discussing the dispersion of varying Asian ethnic groups within Massachusetts).

34. Cf. Phuong Ly, *State Urged to Invest More in English Classes*, WASH. POST, Oct. 27, 2005, at T16 (discussing federal spending cuts hindering Maryland’s effort to provide adult education to burgeoning immigrant population).

35. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 578 (2000).

36. See *id.* (arguing that in the context of international trade law that a false positive is a measure invalidated by the World Trade Organization (WTO) even though the measure is actually not protectionist, while a false negative is a measure that the WTO upholds, even though the measure unfairly favors economic interests in one nation).

health risk, we would be committing a “Type II” error, resulting in a false negative. Guarding against each error is important, since each has opportunity costs. If we restrict the erection of power lines because of erroneous health concerns, we forego the savings generated by ready distribution of electricity. By the same token, if we unduly discounted health risks linked with power lines, we would be neglecting an opportunity to enhance the health and well-being of persons subject to these risks and would end up paying more in medical costs.

The law often imposes procedural safeguards to promote accuracy. In the environmental setting, for example, the National Environmental Policy Act (NEPA) requires an environmental impact statement (EIS) prior to the start of a project.<sup>37</sup> This requirement gives a developer of a site an opportunity to consider whether a project may harm the environment, and it gives community groups, elected officials, and the media an opportunity to conduct a dialogue regarding possible harms.<sup>38</sup> The changes to a project accomplished through the EIS process establish the virtues of such procedures.

The criminal justice system historically cares more about false positives than about false negatives.<sup>39</sup> No justice system that is worthy of the name can discount the concern about false positives, whether the adjudication concerned is criminal or civil, judicial or administrative.<sup>40</sup> Procedures that avoid false positives are also arguably central to international-law guarantees of due process.<sup>41</sup>

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37. See 42 U.S.C. § 4332(2)(C).

38. See *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 389 (2008) (Ginsburg, J., dissenting) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)); cf. Jared Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1460924> (arguing that the majority in *Winter* undermined NEPA by allowing the Navy to continue training exercises that allegedly harmed marine mammals while it completed an EIS).

39. Cf. *In re Winship*, 397 U.S. 358, 362-63 (1970) (stating that the rules of evidence are “historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions” (quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)) (internal quotation marks omitted)); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009) (discussing wrongful convictions produced by poor application of forensic science).

40. Cf. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that President Bush’s order establishing military commissions failed to provide for rudimentary procedural safeguards).

41. See David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 79-80 (2005) (discussing international procedural norms in military commission context).

Some argue that terrorism presents a different calculus. For example, in the early response to September 11, constitutional scholar Laurence Tribe argued that we needed to pay more attention to the problem of false negatives.<sup>42</sup> When wrongdoing involves the risk of thousands of lives, as a terrorist attack can, applying *Winship*'s approach to all detention cases gives the public interest short shrift. In other contexts involving detention, we insist on far less evidence. For example, the detention of prisoners of war requires no evidence of concrete conduct;<sup>43</sup> it is sufficient to just wear an enemy uniform.

The Bush administration took this approach to an extreme. It cared very little about the problem of false positives. To determine the status and dangerousness of Guantanamo detainees, the government relied principally on Combatant Status Review Tribunals (CSRTs).<sup>44</sup> The CSRTs do not allow legal representation.<sup>45</sup> They frequently failed to provide a detainee with the evidence against him, notice of the most serious charges, or an opportunity to challenge that evidence.<sup>46</sup> They also typically do not allow a detainee to present evidence beyond the detainee's own testimony. In addition, the government can convene more than one CSRT per detainee, to shop for the result it desires.<sup>47</sup>

The Bush administration never acknowledged that combat against terrorist groups also makes avoidance of false positives more urgent. Terrorists generally do not wear uniforms. This raises the risk that we will mistakenly detain those who are in the wrong place at the wrong time.<sup>48</sup> While independent reports suggest that a significant cohort of detainees remaining at Guantanamo are dangerous, these reports also acknowledge that the procedures estab-

42. See Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush's Military Courts*, NEW REPUBLIC, Dec. 10, 2001, at 18, 20.

43. See *Hamili v. Obama*, 616 F. Supp. 2d 63, 74-76 (D.D.C. 2009).

44. See MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS—CSRT: THE MODERN HABEAS CORPUS? 7 (2006), available at [http://law.shu.edu/publications/guantanamoReports/final\\_no\\_hearing\\_hearings\\_report.pdf](http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf). The government has used military commissions in only a handful of cases.

45. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

46. *Id.* The CSRTs also had no limits on the introduction of hearsay evidence, making the ability to challenge adverse evidence "more theoretical than real." *Id.*

47. See DENBEAUX & DENBEAUX, *supra* note 44, at 37. Despite stacking the deck, the Bush administration sometimes generated false negatives when it released detainees to please American allies. See White, *supra* note 20.

48. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (discussing the risk of sweeping up "errant tourist, embedded journalist, or local aid worker").

lished by the Bush administration led to an unacceptably high rate of false positives.<sup>49</sup>

#### D. *Summary*

The Bush administration's experience illustrates the interdependence of the values identified in this section. The Bush administration assembled Guantanamo in a search for the most efficient way to eliminate false negatives. Ultimately, however, the Bush system's indifference to false positives undermined the legitimacy of its counterterrorism program. The damage done to America's reputation made counterterrorism policy less efficient in the long term than a policy that matched toughness with concern for traditional safeguards. Moreover, the unilateralist temperament that guided Guantanamo's emergence as a site for suspected terrorists also alienated the courts, which proceeded to modify the system that Bush officials had created.<sup>50</sup>

## II. SIGNALING AND NORMS

As the Bush administration's experience demonstrates, norms like efficiency, equity, and accuracy do not play out in a vacuum. Political and legal disputes inevitably introduce various audiences and constituencies. The tensions between norms become even more acute when one considers that different audiences prioritize different norms. For example, the audience for United States foreign policy includes domestic audiences like the Congress, the courts, the press, and the public, along with advocacy groups on one side of an issue or another. International audiences also figure in the equation, including foreign governments, transnational tribunals, and electorates. Before indicating approval of an executive policy, each audience looks for a signal that the President shares its norms.

#### A. *Signaling, Values, and Trust*

Signaling is crucial because a central problem with public and private life is a paucity of trust.<sup>51</sup> People in public life encounter suspicion from audiences who believe that the leader cannot be

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49. See BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 74-79 (2008).

50. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 205-08 (2007).

51. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18-20 (2000).

trusted to observe a norm valued by that audience. The audience will then be unwilling to cooperate with the leader. Individuals and entities send signals to indicate that they are worthy of trust. For example, a bank-seeking depositor will invest in a building to indicate to potential customers that it intends to be around for a long time and thus will not sell out the customer for a quick pay-off.<sup>52</sup> However, people run into difficulties when perceptual asymmetries lead different audiences to interpret signals in different ways. As a quick example, suppose that a young male professional decides that a modest ear piercing will signal fashion sense.<sup>53</sup> This signal works well with other moderately fashion-conscious young professionals. However, it may send the “wrong” signal to other groups. For example, older individuals may believe that even a modest piercing signals a fundamental rejection of norms associated with civilized society. Some older individuals clearly took this view of long hair in the 1960s. On the other hand, it is possible that some groups that do sincerely reject mainstream norms, such as gangs, may also view our earnest but fashionable professional as an aspirant to membership in their group. They may seek to enlist the professional in initiation rituals that conflict with mainstream values. The result may be a threat to the professional standing of the actor (with older people) or a threat to his health (with gangs).

Politicians must be aware of the possibility of such perceptual asymmetry, or “mixed or crossed signals” in the vernacular. When such asymmetries occur, one audience will view the leader as untrustworthy and will retaliate or hedge its bets. Leaders need to understand the interpretations that different audiences will attribute to particular signals in addition to understanding their subjective intent. Saying “I meant well” is an indication that such perceptual asymmetry has muddled the leader’s message.

#### B. *Flawed Signaling and Path Dependence*

Faulty signaling has costs that are sometimes irreversible. Some might argue that issues with initial signals matter little because a President has the resources to recoup later, by righting her message. Unfortunately, one cannot guarantee that garbled signals will be costless in this way. This is true because of the phenomenon of path dependence.

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52. *Id.* at 20-21.

53. *Id.* at 29.

Path dependence suggests that where we have been influences where we are going. Taking a different path to a goal makes certain options more or less palatable to different groups. Measures that may be acceptable in one signaling environment become unacceptable when the environment changes. If the President loses credibility on an issue, he will have to spend valuable capital in returning to the status quo ante. For example, if a crucial audience interprets a presidential signal as a preference for efficiency over accuracy, it will demand a more rigorous bonding mechanism to ensure that the President values accuracy appropriately. For example, the courts responded to the Bush administration's overreaching on detention by requiring procedural safeguards.<sup>54</sup> Moreover, losing credibility with a crucial audience gives adversaries an opening. Credibility can be difficult to recoup. While a President consumes time and effort in this task, the other side has the opportunity to promote its own agenda.<sup>55</sup> These consequences need not be fatal to the President's policy preferences. However, they do introduce complications that more judicious signaling could have finessed.

With this framework in mind, we can consider the impact of President Obama's January 2009 announcement of a one-year deadline for closing Guantanamo.

### III. THE GUANTANAMO CLOSURE DEADLINE: CONSEQUENCES, INTENDED AND UNINTENDED

The Obama administration has done many things right in its efforts to close Guantanamo and paved the way for a process that vindicates United States security needs and the demands of justice. It has made a concerted effort to reverse the unilateralism and high-handed policies of the Bush administration. However, it did a number of those things in the wrong order, which needlessly complicated its task and spawned opportunity costs.

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54. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that detainees had access to habeas corpus).

55. For more on path dependence, see ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 108-110 (2009); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606-22 (2001).

A. *The Obama Closure Announcement and the Reframing of Efficiency*

President Obama's announcement that he would close Guantanamo within a year redefined efficiency in counterterrorism. Bush and Cheney viewed efficiency narrowly, as the speed entailed in taking concrete steps to kill or incapacitate terrorists.<sup>56</sup> President Obama has a broader vision. While the President does not slight the importance of killing or detaining those who would do violence against the United States, he also views efficiency as entailing the accumulation of good will throughout the world.<sup>57</sup> The President understands the importance of American soft power to our ability to achieve policy goals.<sup>58</sup> When America has credibility on the world stage, it can count on cooperation from other governments and populations. Moreover, American credibility blunts charges of excess or hypocrisy that furnish recruiting tools for terrorists.

President Obama noted in his closure order that Guantanamo had become a symbol of overreaching that undermined the United States's global reputation.<sup>59</sup> Closing Guantanamo was one element in a program to efficiently restore American credibility. Armed with that credibility, America could win the battle for hearts and minds. President Obama's view of the strategic value of closing Guantanamo was correct. However, his sequencing of events created doubts about both the accuracy and equity that impeded this larger project.

B. *The Costs of Faulty Sequencing*

The Obama administration's setting of a one-year deadline for closing Guantanamo created a backlash on Capitol Hill that

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56. As President Bush's second term progressed, key figures like Secretary of Defense Robert Gates (held over by incoming President Obama) and Secretary of State Condoleezza Rice came to believe that the closure of Guantanamo would promote America's foreign policy goals. While Secretary Gates drew down the Guantanamo detainee census, the Bush administration could not mount a sustained effort to close the facility. See Helen Cooper and William Glaberson, *At White House, Renewed Debate on Guantanamo*, N.Y. TIMES, June 23, 2007, at A1.

57. See Executive Order 13,492, *supra* note 5, § 2(b), at 4897.

58. See JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 35 (2002) (warning that global reaction to American tactics viewed as excessive will undermine cooperation); Christopher J. Borgen, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 774-78 (2009) (discussing the importance of global credibility); cf. Harold Honju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1499-1501 (2003) (arguing against unilateral policies).

59. See Executive Order 13,492, *supra* note 5, § 2(b), (d), at 4897, 4898.

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stretched across party and ideology. Some dismissed this backlash as a crude expression of the “Not-In-My-Backyard” (NIMBY) syndrome.<sup>60</sup> NIMBY surely played a role. However, legitimate concerns with accuracy and equity also drove opposition.

### 1. Signaling on Accuracy

First consider the issue of accuracy. The Obama administration understood the problem of false positives that it had inherited from the Bush administration.<sup>61</sup> However, it did not initially take adequate stock of the problem of false negatives. Officials who pushed for the one-year deadline had not yet inspected the files of Guantanamo detainees.<sup>62</sup> These officials therefore lacked adequate information on the dangerousness of individual detainees, or on difficulties the administration would encounter in resettlement efforts.<sup>63</sup>

An approach that reconciled the problems of false positives *and* negatives would have started instead with a comprehensive review of detainee law and policy as well as an examination of individual detainee files. This review and analysis could have paved the way for setting a realistic deadline for closing the facility. The administration instead first announced that it intended to close Guantanamo within a year, and only then began its review of the files.

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60. See Sarah Mendelson, *The Guantanamo Countdown*, FOREIGN POL'Y, Oct. 1, 2009, available at [http://www.foreignpolicy.com/articles/2009/10/01/the\\_guantanamo\\_countdown?page=0,1&%24Version=0&%24Path=/&%24Domain=.Foreignpolicy.com,%20%24Version%3D0](http://www.foreignpolicy.com/articles/2009/10/01/the_guantanamo_countdown?page=0,1&%24Version=0&%24Path=/&%24Domain=.Foreignpolicy.com,%20%24Version%3D0) (asserting that “members of Congress were running for cover like children in a rain storm”); Editorial, *Hypocrisy on the Hill*, WASH. POST, July 5, 2009, at A18.

61. See Executive Order 13,492, *supra* note 5, § 2(b), at 4897.

62. See Kornblut & Linzer, *supra* note 3; cf. KEN GUDE, CTR. FOR AM. PROGRESS, GETTING BACK ON TRACK TO CLOSE GUANTANAMO 3 (2009), available at [http://www.americanprogress.org/issues/2009/11/pdf/closing\\_guantanamo.pdf](http://www.americanprogress.org/issues/2009/11/pdf/closing_guantanamo.pdf) (noting that Obama officials found that detainee files were in disarray, which further slowed the review process).

63. Resettlement difficulties flow from two sources. First, the Bush and Obama administrations both agreed not to transfer detainees to countries where the detainees would face a risk of torture. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, arts. 1-2, U.N. GAOR, U.N. Doc. A/39/51 (Dec. 10, 1984); cf. *Belbacha v. Bush*, 520 F.3d 452, 454 (D.C. Cir. 2008) (noting Algerian detainee's fear of torture); Del Quentin Wilber, *Chinese Detainees' Release Is Blocked*, WASH. POST, Oct. 9, 2008, at A3 (noting Chinese detainees' fear of torture). Second, both administrations worried about security arrangements for released detainees in Yemen, the country of origin for approximately forty percent of the detainees remaining as of October 2009. See Robert F. Worth, *Wanted by F.B.I., but Walking out of a Yemen Hearing*, N.Y. TIMES, Mar. 1, 2008, at A3 (noting convicted terrorist's exit from court hearing in Yemen).

This sequencing made the one-year deadline seem arbitrary. Announcing the deadline also allowed opponents to argue that the administration had discounted the need for accuracy in release decisions.<sup>64</sup>

Congress responded quickly. In resolutions and appropriations measures, it sought to bar the expenditure of federal funds on closing Guantanamo and resettling detainees within the United States.<sup>65</sup> It also required the executive to notify Congress when release of a detainee was imminent.<sup>66</sup>

Congress's restrictions on closing Guantanamo were a proxy for concerns about accuracy. Substantial uncertainty surrounded decisions about the dangerousness of remaining detainees. Congress understood that uncertainty includes both the probability and gravity of harm. Any release process carries with it the prospect of some false negatives. Moreover, a terrorist attack on the site used for the trial or detention of a terrorist would have catastrophic consequences, as New York discovered during the first attack on the World Trade Center in 1993 and the September 11 attacks. Since the government could not guarantee determinations of dangerousness that are completely accurate, Congress sought to compensate for that accuracy deficit by prohibiting the transfer of detainees to the United States.<sup>67</sup>

This was not the first time that Congress has acted out of uncertainty about both the probability and gravity of false negatives.<sup>68</sup>

64. Both the President and Secretary of Defense Gates have argued that setting a deadline signals to the bureaucracy that statements about change are not mere "cheap talk." That position makes intuitive sense. However, it is unclear that President Obama's closure deadline had such salutary consequences. Experts have noted that bureaucrats lost interest in the difficult, tedious task of sorting through detainee files because no one person in the White House mounted a sustained effort to complete the task. See Mendelson, *supra* note 60. Moreover, the administration also failed to promptly follow up on the Inauguration Day announcement's potential for generating cooperation in other countries. A special diplomatic envoy to promote detainee resettlement was not in place until months after the President's announcement. *Id.*

65. See Supplemental Appropriations Act, H.R. 2346, Operation and Maintenance, Defense-Wide § 3, 111th Cong. (2009) (engrossed amendment as agreed to by Senate, May 21, 2009) (making funds available only to relocate detainees outside the United States), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2346eas.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2346eas.txt.pdf).

66. See Editorial, *supra* note 60.

67. *Id.*

68. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 694 (2009).

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Some measures have been struck down by courts<sup>69</sup> or have survived largely as negative examples.<sup>70</sup> Others have met with somewhat greater acceptance. For example, in *Demore v. Kim*, the Supreme Court upheld Congress's decision to require prehearing detention of persons deportable because they have engaged in terrorism or committed a criminal offense.<sup>71</sup> The Court noted that many people show up at hearings when individualized determinations including bond are required.<sup>72</sup> However, there are invariably some false negatives—people who turn out to be flight risks despite the individualized assessments. The Court found that Congress could have reasonably decided that it wanted to cut false negatives to zero.<sup>73</sup> The Guantanamo restrictions have a similar underlying rationale.

This rationale echoes traditional approaches to tort law and other areas. Courts have long balanced the probability and gravity of harm.<sup>74</sup> When a particular harm is sufficiently grave, precautions increase even if probabilities are low. To consider a good analogy, take the case of peanut allergies. A prudent individual with such an allergy will avoid even a low probability of exposure because he knows the stakes. Some public policy decisions embody a similar logic.<sup>75</sup>

Congress's efforts also signaled that it wanted greater consultation with the President on decisions regarding detention of suspected terrorists.<sup>76</sup> Some of that further input might take the form of additional legislation, while in other cases informal consultation might be sufficient. In any case, Congress indicated that it wished to be kept apprised.

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69. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2242 (2008) (striking down provisions of Military Commissions Act limiting habeas corpus).

70. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding statute criminalizing failure to comply with executive order that Japanese-Americans evacuate their homes on the West Coast).

71. 538 U.S. 510, 531 (2003).

72. *Id.* at 520.

73. *Id.* at 528.

74. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

75. See Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511-13 (2008) (noting flexibility in standing doctrine regarding challenges to long-term environmental harms).

76. For an important discussion of the role of resolutions and other nonstatutory measures in congressional signaling, see Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 588-89 (2008).

## 2. Signaling and Equity

In addition, congressional action stemmed from concerns about the new administration's perceived approach to equity. Congress believed that the administration's Guantanamo policy reflected more concern about international aspects of equity in detainee transfers than about domestic ramifications. Viewed from an international perspective, equity would counsel that the United States agree to accept some detainees if it expects other countries to volunteer to do the same. A domestic perspective on equity, in contrast, focuses on burden-sharing among the several states. By not responding to commentators who pushed the international-equity point,<sup>77</sup> the new administration stoked congressional apprehension that it would disregard domestic-equity concerns.<sup>78</sup> The blizzard of bills and resolutions to limit Guantanamo closure reflected this anxiety.<sup>79</sup>

The administration's lack of response on this point also signaled an initial inattention to trade-offs between international equity and the broader conception of efficiency that the administration had hoped to promote. The international goodwill the administration sought involved cooperation from other global powers, including China.<sup>80</sup> However, the Chinese opposed the major international-equity step championed by advocates.<sup>81</sup> Advocates urged that the government permit the resettlement within the United States of the Uighur detainees—ethnic Turks and Chinese nationals who had been training to fight the Chinese government.<sup>82</sup> This step would have also raised accuracy concerns: federal law and policy has long sought to deter those planning violence against an-

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77. See, e.g., Mendelson, *supra* note 60 (arguing for international perspective on equity and detainee transfers).

78. *Id.*

79. *Id.*

80. Chinese cooperation would be necessary, for example, for efforts to contain Iran's nuclear ambitions.

81. See Erik Eckholm, *Freed from Guantanamo, Uighur Muslims Bask in Bermuda*, N.Y. TIMES, June 15, 2009, at A4.

82. For a cogent argument in favor of this position, see Barbara Olshansky, *Why Are We Trying to Solve the "Problem of Guantanamo?"*, A.B.A. NAT'L SECURITY L. REP., Nov.-Dec. 2008, at 5, available at [http://www.abanet.org/natsecurity/nslr/2008/nov\\_dec\\_nslr\\_final.pdf](http://www.abanet.org/natsecurity/nslr/2008/nov_dec_nslr_final.pdf). See also *Kiyemba v. Obama* (*Kiyemba I*), 555 F.3d 1022, 1024 (D.C. Cir. 2008) (finding evidence that "indicated that at least some petitioners intended to fight the Chinese government, and that they had received firearms training . . . for this purpose" (citing *Parhat v. Gates*, 532 F.3d 834, 838, 843 (D.C. Cir. 2008))).

other regime from using the United States as a hub.<sup>83</sup> Admission of the Uighurs into the United States would have given them access to United States's wealth and communications networks to continue their fight against the Chinese regime. In contrast, settling the Uighurs elsewhere would limit the detainees' influence and access.<sup>84</sup> The Chinese government was legitimately concerned about this issue. However, the administration initially equivocated about the Uighurs, which China could have viewed as a signal that the administration had discounted Chinese concerns.<sup>85</sup>

#### IV. THE OBAMA ADMINISTRATION FINDS ITS BEARINGS

After a start hindered by faulty sequencing, the new administration has made substantial progress in righting the course. President Obama outlined the framework in his speech at the National Archives in May 2009.<sup>86</sup> The President's approach placed accuracy front and center and offered an approach that would minimize false positives *and* negatives. Promoting accuracy will also serve the broader definition of efficiency advanced by the new administration by building international goodwill and leveraging America's still-substantial reserves of "soft power."

Broadly speaking, the President's May address outlined a three-part approach to the detention of suspected terrorists. First, the President noted, criminal prosecution in civilian courts will be

83. *Kiyemba I*, 555 F.3d at 1029 n.14 (citing 8 U.S.C. § 1182(a)(3)(B)(i)(I)) (providing for the exclusion from the United States of aliens who engage in terrorist activity, including preparations for violence against another government). Those accuracy concerns were present even though the Uighur detainees posed no direct threat to the United States. *Id.*; *cf. Parhat*, 532 F.3d at 854 (finding that the government had failed to prove that Parhat, an ethnic Uighur, was an "enemy combatant"). Declining to provide safe harbor to those plotting violence against another regime promotes reciprocity in counterterrorism policy by encouraging other countries to deny safe harbor to those plotting violence against the United States. *See also* *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (analyzing provisions of the Foreign Intelligence Surveillance Act that authorize surveillance upon finding by court that target of surveillance is an agent for a foreign group seeking to "carry out raids against other nations").

84. The government has agreed that the Uighurs cannot be sent back to China because of the risk that they would be tortured. *See Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 514 (D.C. Cir. 2009) (discussing government policy, while declining to order that the government provide advance notice to detainees of resettlement plans). The United States should provide other Uighurs who are already in the United States or duly apply for admission with an opportunity to demonstrate that they fall outside the exclusion provision cited above and qualify for refugee status. *See* 8 U.S.C. § 1158(a) (2006) (defining refugee status).

85. By June, the administration had righted the ship on this score, resettling a number of Uighur detainees in Bermuda. *See* Eckholm, *supra* note 81.

86. *See* Obama Remarks, *supra* note 10.

the preferred route where “feasible.”<sup>87</sup> Second, the President noted, military commissions are also an appropriate forum where detainees are charged with violations of the law of war.<sup>88</sup> Third, the President asserted, in a small number of cases, trial in any venue will not be an option, and the government will then detain individuals under the laws of war while providing procedural safeguards and periodic review.<sup>89</sup>

This framework is sound. However, a couple of caveats are worth noting for further analysis. First, President Obama’s May 2009 framework balanced liberty and security precisely because it focused on overall values, instead of tailoring values to closure of Guantanamo by a date certain.<sup>90</sup> Second, in some particulars the President’s approach did not adequately deal with the problem of false positives, both on questions of the reliability of evidence that courts have addressed since and on the question of extending accountability to other detention sites, including the United States air base at Bagram in Afghanistan. This part explores the President’s framework and pays particular attention to lingering accuracy issues.<sup>91</sup>

#### A. *Balancing Error Rates in Criminal Prosecutions*

The Obama administration’s decision to try both alleged 9/11 mastermind Khalid Shaikh Mohammed and alleged Christmas Day

87. *Id.* at 252; see also Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (arguing that federal courts can successfully conduct terrorism trials); *Prosecuting Terrorists: Civilian and Military Trials for Guantanamo and Beyond*, Hearing Before the Subcomm. on Terrorism and Homeland Security of the S. Comm. on the Judiciary, 111th Cong. (2009) (LexisNexis Congressional) [hereinafter *Subcommittee Hearing*] (remarks of Sen. Sheldon Whitehouse, D-R.I.) (same).

88. See Obama Remarks, *supra* note 10. The Obama administration also worked with Congress after the May address to refine rules on military commissions. See, e.g., *Subcommittee Hearing*, *supra* note 87 (testimony of Jeh Johnson, General Counsel for the Defense Department, and David Kris, Assistant Att’y Gen. for National Security). In addition, the administration set up task forces on detention and other matters to clarify its legal approach.

89. Obama Remarks, *supra* note 10.

90. *Id.* The President did not disavow that date, although the conventional wisdom shifted toward the view that meeting the one-year deadline would be difficult, if not impossible.

91. The next Part analyzes options under this framework for closing Guantanamo.

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bomber Umar Farouk Abdulmutallab in federal court<sup>92</sup> suggests that the President views the criminal justice system as the first resort for the trial of suspected terrorists. The federal courts have a reputation for independence that stems from the Constitution, the Framers, and the early precedents of the Supreme Court.<sup>93</sup> Moreover, judges will best be able to balance the accountability supplied by open proceedings and the need for security required in exigent circumstances.

To avoid false positives, federal judges presiding over trials of alleged terrorists must carefully analyze evidentiary issues. They should exclude statements obtained through the use of coercive techniques. Judges should also exclude evidence of marginal relevance that will tend to inflame the jury, such as the video of Osama bin Laden offered by the government in a case against a Hamas fundraiser.<sup>94</sup>

However, judges will also need to calibrate the rules of criminal procedure to give the government the flexibility that transnational terrorism cases require. For example, the exigencies of apprehending suspects abroad often preclude the immediate provision of a lawyer. Government agents should be able to tailor *Miranda* warnings to the resources available in a foreign country with a different legal system.<sup>95</sup> Similarly, the warrant clause of the Fourth Amendment should not apply to searches abroad.<sup>96</sup> Instead, courts should evaluate such searches under standards of reasonableness that consider the prevailing environment in the nation

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92. See Eric Lichtblau & Benjamin Weiser, *For Both Sides, Unparalleled Legal Obstacles*, N.Y. TIMES, Nov. 14, 2009, at A13 (discussing decision regarding Khalid Shaikh Mohammed); Savage, *Nigerian Indicted in Terrorist Plot*, *supra* note 4 (discussing charges filed against Abdulmutallab).

93. See Gerald E. Rosen & Kyle W. Harding, *Reflections upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel"*, 29 FORDHAM URB. L.J. 791, 791-92 (discussing the role of the Framers in drafting the Constitution to provide for an independent judiciary and the role of the Supreme Court in defining its role as an independent coequal branch of the government).

94. See *United States v. Al-Moayad*, 545 F.3d 139, 161-63 (2d Cir. 2008).

95. See *United States v. Odeh (In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fifth Amendment Challenges))*, 552 F.3d 177, 206-09 (2d Cir. 2008) (upholding modified *Miranda* warning in case of defendant convicted of role in 1998 bombings of United States Embassies in Kenya and Tanzania).

96. See *United States v. Odeh (In re Terrorist Bombings of the U.S. Embassies in E. Afr. (Fourth Amendment Challenges))*, 552 F.3d 157, 167 (2d Cir. 2008) (holding "that the Fourth Amendment does not govern searches conducted abroad by U.S. agents").

where the search occurred.<sup>97</sup> In addition, judges may need to accommodate security concerns by allowing *ex parte* presentations on the sources and methods that produced information justifying a search.<sup>98</sup> These changes vindicate the public interest in pursuing and deterring terrorists while preserving the accountability that distinguishes American law.<sup>99</sup>

### B. Military Commissions

As President Obama indicated in his May 2009 remarks, military commissions are an appropriate and lawful way to try suspected terrorists.<sup>100</sup> The Framers were aware of the need for military commissions, since they were familiar with General Washington's use of a military commission to try the British spy Major John Andre during the Revolutionary War.<sup>101</sup> The government also used military commissions during the Civil War<sup>102</sup> and World War II.<sup>103</sup> Military commissions provide an additional layer of protection for sensitive information as well as greater flexibility in the in-

97. See *id.* (holding "that searches of U.S. citizens [abroad] need only satisfy the Fourth Amendment's requirement of reasonableness").

98. *Id.* at 165-67.

99. See generally Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (arguing that criminal adjudication of terrorism cases is becoming more flexible, while other forums such as military commissions are providing more procedural safeguards to defendants, leading to common ground); Zabel & Benjamin, *supra* note 87 (arguing that federal courts fashioning flexible rules should be first resort for prosecution of terrorism cases). Some have argued that to ensure flexibility Congress should establish a National Security Court. See GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 164-93 (2009); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 110-24 (2008). However, a National Security Court could institutionalize shortcuts around due process, while military commissions and detention under the laws of war have the virtue of being temporary measures that would more readily fade into disuse if the need diminishes. For a useful debate, see Amos N. Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008), <http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf>.

100. Obama Remarks, *supra* note 10. For a dissenting view, see Gude, *supra* note 62, at 4 (arguing that military commissions provided insufficient procedural safeguards, compared with courts martial).

101. See *Ex Parte Quirin*, 317 U.S. 1, 31 n.9 (1942). See generally Obama Remarks, *supra* note 10 (discussing history of military commissions).

102. See Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in PRESIDENTIAL POWER STORIES 93, 94-96 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

103. See *Quirin*, 317 U.S. at 48 (upholding use of military commission to try German saboteurs).

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troduction of evidence and the choice of charges against defendants.

Under the Constitution's Define and Punish Clause,<sup>104</sup> Congress has some leeway in designating crimes punishable by military commission.<sup>105</sup> Military commissions probably have jurisdiction over crimes such as conspiracy.<sup>106</sup> Military commissions have often tried defendants based on conspiracy charges, and international law provides that defendants accused of crimes akin to conspiracy, such as participation in a Joint Criminal Enterprise, may be tried in analogous settings.<sup>107</sup> Any other result would allow terrorists to game the system and encourage false negatives.

However, reviewing courts must limit this flexibility to ensure that false positives do not proliferate. Certain allegations, such as the provision of material support to the organization, may not fit within the rubric of the law of war absent a showing of specific intent to aid in hostilities against the United States or its allies.<sup>108</sup> A military commission would lack jurisdiction to hear such cases. A commission would also lack jurisdiction over charges involving conduct that was not criminal at the time the conduct occurred.<sup>109</sup>

Military commissions should also limit the evidence they can admit. A military commission should not admit evidence obtained by coercion. As Anglo-American courts have held for over two hundred years, evidence obtained in this manner is unreliable.<sup>110</sup>

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104. U.S. CONST. art. I, § 8, cl. 10 (granting Congress power "[t]o define and punish . . . Offences against the Law of Nations").

105. Cf. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 (2001) (suggesting that courts will likely accord substantial deference to Congress's determinations regarding offenses against international law).

106. *Hamdan v. Rumsfeld*, 548 U.S. 557, 598-601 (2006) (plurality opinion) (asserting that the law of war did not encompass conspiracy). Moreover, *Hamdan* concerned a unilateral executive order, not a statute enacted by Congress pursuant to its authority under the Define and Punish Clause. *Id.* at 601.

107. *Id.* at 611 n.40; cf. Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1172 (2007) (arguing that conspiracy prosecutions may serve expressive goals under the law of war).

108. One bill currently under consideration in Congress designates material support of the organization as a war crime, along with material support of hostilities. See H.R. REP. NO. 111-288, § 1802, at 423 (2009) (Conf. Rep.). The broader definition is problematic under the law of war, even given Congress's leeway under the Define and Punish Clause.

109. See Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 180 (2008). Whether prohibitions in civilian criminal law or the common law of war would provide adequate notice to a defendant charged before a military commission is a matter beyond the scope of this Article.

110. See *R. v. Warickshall*, (1783) 168 Eng. Rep. 234, 234-36 (K.B.).

Admitting such evidence would raise the risk of false positives to intolerable levels as well as encourage deterioration in the institutional culture and controls that have long been the pride of the American military.

### C. *Detention Under the Law of War*

Detention of civilians who have assisted combatants is permissible under the law of war. However, here too, limits are necessary to avoid providing a “blank check” to the government.<sup>111</sup> Fortunately, courts have already done useful work in striking this balance.<sup>112</sup>

To avert false negatives, the administration should adopt the reasoning in *Hamli v. Obama*.<sup>113</sup> The *Hamli* court found that the law of war, including the Geneva Convention, supported detention of putative civilians who were “part of” Al-Qaeda or the Taliban.<sup>114</sup> The court rightly found authority for such detention in Congress’s Authorization for Use of Military Force (AUMF), passed shortly after September 11.<sup>115</sup> International law also has implied that a government involved in a conflict with a terrorist group can detain putative civilians who function as part of the group’s infrastructure, either giving or receiving commands and undertaking obligations to the group in excess of duties undertaken by an ordinary civilian worker in a conventional state.<sup>116</sup> An individual who

111. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). See generally Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (offering criteria and procedures for detention).

112. See *Hamli v. Obama*, 616 F. Supp. 2d 63, 78 (D.D.C. 2009) (holding that the President may detain persons who “planned, authorized, committed, or aided the terrorist attacks . . . and persons who harbored those responsible for those attacks”).

113. *Id.* at 70-76.

114. *Id.* at 75; cf. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109-15 (2005) (discussing interaction of law of war and Congress’s post-September 11 Authorization for the Use of Military Force); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 53-55 (2009) (discussing authority under law of war for detention of civilians indirectly assisting combatant groups).

115. See *Hamli*, 616 F. Supp. 2d at 71 (noting that “[t]he AUMF authorizes the President to ‘use all necessary and appropriate force against those . . . organizations . . . he determines planned, authorized, committed, or aided’ the September 11 attacks” (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2006)))).

116. See *id.* at 73-75 (citing, inter alia, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Part IV, June 8, 1977, 1125 U.N.T.S. 609). Protocol II protects “civilians” from targeting by a government engaged in a conflict

knowingly transports weapons for Al-Qaeda, for example, can be detained.<sup>117</sup> However, the provision of such material support is merely *evidence* that the individual is part of Al-Qaeda, not an independent substantive basis for detention.<sup>118</sup>

While these distinctions can be difficult, determining the admissibility of evidence is even more complex. Courts should require that the government establish the accuracy and reliability of its evidentiary submissions instead of receiving a presumption of accuracy.<sup>119</sup> The court should consider consistency with other evidence, circumstances surrounding the obtaining of such evidence, and accuracy of translation. Accusations by a witness previously judged unreliable may be discounted if also based on hearsay, such as conversations by others about the detainee.<sup>120</sup> Here, as elsewhere, informants, including jail snitches, should be regarded with some skepticism.<sup>121</sup> These witnesses often have something to sell and an agenda of their own to vindicate, including striking a better deal for themselves. This prospect, like the prospect of ending a coercive interrogation, may lead the subject to say what his captors wish to hear.

However, courts also need to appreciate that detention under the laws of war has historically been a matter of status and broad indicia of conduct. For example, to detain an individual as a prisoner of war, a government needs to show that the detainee has prepared for or participated in hostilities. Once the government establishes this, detention is authorized.<sup>122</sup> The government does not need to show that a soldier of an enemy power has fired his rifle—capture of the individual in a uniform of an enemy power would be sufficient. It should be sufficient for the government to

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with a terrorist or rebel group. As the *Hamilly* court indicated, such protection would be unnecessary if international humanitarian law classified *all* members of terrorist or armed rebel groups as civilians. See *id.* at 73-74.

117. *Id.* at 75.

118. *Id.* at 75-77.

119. See Ali Ahmed v. Obama, 614 F. Supp. 2d 51, 55 (D.D.C. 2009).

120. *Id.* at 57.

121. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (discussing cooperation and the lawyer's professional responsibility as an officer of the court); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 926-31 (1999) (outlining systemic factors that encourage dishonesty among cooperators).

122. See *Hamilly*, 616 F. Supp. 2d at 74. "The laws of war traditionally emphasize pure associational status as the primary ground for detention; individual conduct provides only a secondary, alternative predicate." *Id.* (quoting Chesney & Goldsmith, *supra* note 99, at 1084) (internal quotation marks omitted).

show that an individual has participated in training at a terrorist camp. Probative evidence of membership should include the detainee's lack of a passport, which often dovetails with Al-Qaeda operatives' tactics to conceal time spent in Afghanistan or Pakistan.<sup>123</sup> Further concrete or specific evidence should not be necessary for detention under the laws of war; to require such evidence confuses the evidentiary showing in this context with the more particularized context appropriate to criminal trials, where the environment typically permits more methodical investigation by law-enforcement authorities. Military apprehension involves a conflict between military goals and law-enforcement goals; courts should not impose pressure on the military to neglect the former in favor of the latter.<sup>124</sup>

#### D. Accuracy and Exit: The Question of Bagram

Accuracy at Guantanamo means little if the government can detain individuals elsewhere based on flimsy evidence. This would allow the government to treat closing Guantanamo as a shell game and enjoy public-relations benefits while maintaining the system that the Bush administration initiated.<sup>125</sup> Accuracy must meet a more robust test.

123. The provision of support should be probative evidence of membership when the support is closely related in time, geography, or operational planning to acts of violence.

124. The exigencies of the battlefield should also inform the reach of criminal procedure. Courts should not require that military personnel capturing suspected terrorists provide *Miranda* warnings. Cf. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1040, 123 Stat. 2190, 2454 (2009) (barring military personnel from providing *Miranda* warnings to captives suspected of terrorist activity). Nevertheless, personnel who interrogate a detainee in the course of a criminal investigation may find it prudent to provide *Miranda* warnings in some form.

A number of commentators have warned that detention regimes undermine the broader view of efficiency espoused by the new administration by risking ongoing alienation of important global audiences. See, e.g., Mendelson, *supra* note 60; Deborah Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT'L L. 577 (2009); cf. Gude, *supra* note 62, at 13 (arguing that detention authority should be limited to individuals captured at or near the battlefield). On balance, the authorization for detention under law-of-war doctrine and the need to prevent further catastrophic attacks outweigh this concern, assuming that such a regime includes procedures to minimize the risk of false positives. Cf. David Cole, *supra* note 68, at 747-50 (arguing for a more circumscribed criteria for detention).

125. The government may also resort to the targeted killing of terrorist operatives. See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679-82 (2003) (discussing international and domestic norms governing targeted killing).

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Fortunately, at least one district court has found this way. In *Maqaleh v. Gates*, the district court held that habeas corpus extended to Bagram Air Base in Afghanistan, where the United States has housed hundreds of detainees, including those brought in from other areas.<sup>126</sup> The court ruled that detainees apprehended outside Afghanistan and rendered there by United States forces were on the same footing as Guantanamo detainees.<sup>127</sup> The Supreme Court had cautioned in *Boumediene v. Bush* that creating habeas-free zones abroad would allow the executive to “contract[ ] away” the accountability the Framers built into the separation of powers.<sup>128</sup> The Obama administration has recently sought to improve procedures at Bagram,<sup>129</sup> but it is unclear whether these steps will make a material difference without the accountability that habeas yields.

## V. SITING APPROACHES

The principles articulated by President Obama in his May 2009 address offer a foundation for considering the logistical question of how to close Guantanamo. With proper judicial review, the three-tiered approach of civilian trials, military trials, and detention under the laws of war can address problems of accuracy. A variety of approaches are possible to ensure equity and efficiency, as well.

### A. *Dispersion Rules*

One common approach to siting difficulties is the use of dispersion rules. These rules promote equity and burden-sharing by guarding against overconcentration of facilities. For example, New York’s law for siting group homes for people with mental disabilities requires a finding that a particular site does not currently have an overconcentration of such uses.<sup>130</sup> The process set up to receive arguments about overconcentration and other issues also has the same benefit as any other process—it channels discussion into a neutral process where people feel that they have been heard. Just

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126. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009).

127. *Id.* at 220.

128. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (“The test for determining the scope of [the habeas corpus guarantee in the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.”).

129. See Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1.

130. See N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C) (McKinney 2006); cf. Margulies, *supra* note 1, at 976-84.

as democracy promotes legitimacy and acceptance by allowing people a voice, a process for siting accomplishes this result. To promote flexibility, Congress could also provide for waiving the dispersion rules in appropriate cases where host communities fashioned workable arrangements with the federal government.

### B. *Siting Commission*

Dispersion rules could also be folded into an even more comprehensive process involving a siting commission. Previous administrations used a commission with some success to address the difficult issue of closing military bases.<sup>131</sup> A commission can apply neutral criteria, including overconcentration. It can also look at the degree of danger a community might fear because of escapes and terrorist reprisals.<sup>132</sup> Finally, it can consider the steps required to minimize these safety issues. While the base closure model concerned closing sites, not opening them, the issues of equity and the public good were largely the same. Each community benefits from a base, which provides employment and a flow of federal dollars, while the public as a whole might benefit from closing some of the bases to avoid redundancy. A similar model might work in the detainee siting context. A commission also provides some political cover for legislators—they can point to the process in the same way that elected officials can avoid commenting on criminal trials by noting that the process is going forward. Legislators are also free to weigh in as part of the process and then can assert credibly that they made their cases and the commission decided based on neutral criteria.

### C. *Site Auctions*

A more controversial approach might be to establish an auction for detainee sites. Under an auction approach, a community or state could bid to establish a site for a given number of detainees. Communities that bid earlier and for higher numbers would receive

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131. See Defense Base Closure and Realignment Commission, About the Commission, <http://www.brac.gov/about.html> (last visited Apr. 28, 2010); see also Ryan Santicola, *Encroachment: Where National Security, Land Use, and the Environment Collide*, 10 ALB. L. ENVTL. OUTLOOK 329, 348 n.117 (2005). One commentator has urged a “blue-ribbon panel” that would serve a similar function for transferring detainees to the United States. See Mendelson, *supra* note 60.

132. For a useful discussion of fears in the context of siting nuclear waste disposal facilities, see Amanda Leiter, *The Perils of a Half-Built Bridge: Risk Perception, Shifting Majorities, and the Nuclear Power Debate*, 35 ECOLOGY L.Q. 31, 64-66 (2008).

benefits from the federal government, including a priority for public-works projects and other federal spending. A cap could limit the number of detainees in any one community, thereby promoting equity goals. Of course, if NIMBY pressures are strong, finding communities to volunteer may be challenging. An additional incentive to elicit bids might be setting a time deadline, after which all communities would go into the “hopper” for consideration by a commission, or perhaps for random assignment.

#### D. *Security Impact Statements*

Another alternative that Congress appears to have embraced as of October 2009 involves security impact statements for each projected transfer.<sup>133</sup> The security-impact-statement approach requires that the President provide Congress with an analysis of the security consequences of each transfer of a Guantanamo detainee to a mainland United States facility.<sup>134</sup> The President must consider security issues caused by the transfer. Furthermore, the President must consult with the governor of each state where a transfer is contemplated, in order to optimize planning. The security impact statement process, like similar processes in environmental law, encourages government to think methodically about consequences. It also allows legislators and others to point to the process as an indication that they understand constituents’ concerns. While some questions may emerge about the constitutionality of the impact statement and consultation provisions, the President will most likely decide that the prudent course is to comply with the legislation. Any other course could result in a continuation of the congressional restiveness that hampered placement efforts for the early months of the Obama presidency.

#### E. *Offshore Siting: Guantanamo Redux?*

For certain environmentally beneficial uses, such as wind farms and liquid natural gas facilities, planners are looking at alternatives such as offshore siting.<sup>135</sup> Offshore siting avoids a disparate impact on any one community and diffuses the NIMBY syndrome.<sup>136</sup>

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133. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454 (2009).

134. *Id.*

135. See Kathryn E. Kransdorf, Note, *Not on My Coastline: The Jurisdictional Battle over the Siting of LNG Import Terminals*, 17 FORDHAM ENVTL. L. REV. 37, 81 (2005).

136. See Mendelson, *supra* note 60.

Guantanamo itself is an offshore facility. One solution to the NIMBY issues hindering Guantanamo's closure is keeping Guantanamo open. The problem with this alternative is that it represents the status quo—Guantanamo is a public relations and human rights problem precisely because it is offshore. This outcome would not be a change of the kind that President Obama promised. The rejoinder is that Guantanamo is a problem not because of its geographic location, *per se*, but because of the legal regime that the former administration implemented by virtue of that location. The courts' imposition of the rule of law on Guantanamo has eased this asymmetry in legal regimes. A detainee camp located at Guantanamo could have even more procedural protections for detainees as well as a more user-friendly environment for the development of appropriate lawyer-client relationships.<sup>137</sup> On this view, Guantanamo is merely a state of mind, subject to change as legal rules promote uniformity and transparency. Through incentives and compensation for states and foreign nations, the government could draw down the Guantanamo census to a core of perhaps fifty to sixty detainees whom the government cannot release because of fears that they will recidivate. While the placement of these detainees at Guantanamo is not optimal from a symbolic standpoint, it at least avoids problems with accuracy that would result from releasing dangerous detainees and the NIMBY problems linked with transfer to the United States.

#### F. *Incentives and Log-Rolling in International Resettlement*

For resettlement internationally, incentives may work better than equity-related dispersion rules. The use of foreign aid to help further the national and broader global interest is nothing new. The United States used this strategy to help contain the spread of Communism in the second half of the last century.<sup>138</sup> Using similar

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137. The government imposed significant obstacles to these relationships. See Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1268422>; Mark Denbeaux & Christina Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 FORDHAM INT'L L.J. 491 (2007); Margulies, *supra* note 19, at 365.

138. Cf. William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1693 (2000) (book review) (discussing role of foreign aid in furthering democracy).



methods to help close Guantanamo will further the cause of global counterterrorism today.<sup>139</sup>

## VI. A BLENDED APPROACH

An effective approach needs to consider both the content of measures related to the closure of Guantanamo and the sequencing of such measures. The administration has moved to put procedures in place to promote accuracy, which courts should accept with the changes mentioned in the previous part on jurisdiction of military commissions, scrutiny of hearsay, and access to habeas at Bagram. As President Obama indicated in his May 2009 address, civilian criminal prosecutions should be the preferred mode in order to take advantage of the additional flexibility signaled by the courts in cases like *Odeh*.

On the equity front, the administration should immediately ask Congress to establish a bipartisan commission to examine issues regarding the resettlement of detainees. If the commission recommends dispersion rules and a waiver system, the administration should support this option. Similarly, the commission should recommend legislation permitting transfer to a secure United States facility of detainees held under the law of war along with a bar on release to any United States community of any such detainee.<sup>140</sup> Legislation authorizing transfer of detainees to United States facilities should authorize only the transfer of detainees who have been determined by a final order of the federal courts to be members of Al-Qaeda.<sup>141</sup> Finally, for other nations, the administration should provide incentives to encourage resettlement while ensuring that receiving countries have adequate security to handle recidivism.

## CONCLUSION

The challenge of closing Guantanamo entails consideration of three perennial values in siting debates: efficiency, equity, and accu-

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139. As one key example, the administration must commit itself to strengthening the capacity of the Yemeni government to arrest, detain, try, and punish terrorists. See Josh Meyer, *Yemen Forms New Front in Terror Fight*, L.A. TIMES, Jan. 3, 2010, at A1.

140. The courts would likely honor this bar. See *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (suggesting that terrorism or other cases that would “leave [an] ‘unprotected spot in the Nation’s armor’” constitute an exception to the general rule that government cannot detain aliens if it has no reasonable prospect of deporting them to another country (quoting *Chew v. Colding*, 344 U.S. 590, 602 (1953))).

141. Some detainees have declined to seek habeas relief. In such cases, the Secretary of Defense should certify prior to a transfer to custody within the United States that release would endanger national security.

racy. President Obama's one-year deadline for closing Guantanamo reframed efficiency in a salutary manner, considering Guantanamo's role as a symbol that suppressed international cooperation with counterterrorism policies. However, the President and his advisors did not anticipate the signal the closure pledge sent to Congress. Congress interpreted the closure pledge as heralding a reduced commitment to accuracy in ferreting out false negatives. It also viewed the pledge as privileging conceptions of international equity over concern about states taking more than their fair share of detainee transfers.

Hindsight suggests that the new administration should have developed a comprehensive plan first and arrived at a deadline for closing Guantanamo as it implemented the plan. President Obama's May 2009 address realigned the administration's signals with Congress's expectations while also signaling the President's commitment to the rule of law. More needs to be done to control the jurisdiction of military commissions, assure the reliability of hearsay evidence, and provide habeas to detainees at other sites such as Bagram. Any delays in the closure of Guantanamo are a small price to pay for ensuring the appropriate balance of efficiency, equity, and accuracy in detention policy.